IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 277 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DEVIBEN W/O RAGHABHAI @ KESHAVBHAI MORARBHAI
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 277 of 1996
MR KB ANANDJIWALA for appellants Nos. 1 and 2
Ms. Hansa Punani, APP, for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE M.H.KADRI

Date of decision: 13/06/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. The appellants, original accused Nos. 1 and 2, by filing this appeal under Section 374(2) of the Code of Criminal Procedure ('Code' for short), have challenged the judgment and order dated March 12, 1996, passed by the learned Additional Sessions Judge, Surat, in Sessions Case No.155 of 1994, by which both the appellants were convicted for the offences punishable under Section 302 read with Section 114 of the Indian Penal Code ("IPC" for short) and both of them are sentenced to undergo R.I. for life and fine of Rs.500/each in default S.I. for one month.

2. Briefly stated, the prosecution case is as under: Deceased Kusumben was the daughter of P.W.3, Balwantbhai Becharbhai Surti and P.W.4, Ambaben Balwantbhai. Deceased Kusumben was residing with her parents at village Arethan, Taluka Olpad, District Surat. Kusumben was first married to one Naginbhai Dhanjibhai prior to eight years from the date of the incident which took place on July 11, 1994. The record indicates that the marriage between Kusumben and Naginbhai lasted for two years and, after two years, the previous husband of Kusumben, Naginbhai, was found missing and his whereabouts were not known. The second marriage of Kusumben had taken place prior to three months of the date of the incident with one Kantilal Nathabhai of village Rander. Said Kantilal was residing at village Rander in a joint family consisting of himself, his wife, his brother Nareshkumar (appellant No.2 herein), his wife Arunaben, and the parents. Whenever Kusumben visited her parents after the second marriage, she was telling her parents that she was having cordial relations with her in-laws and her husband, and there was no illtreatment meted out to her in her matrimonial home. On July 8, 1994, the appellant No.2, Nareshbhai, had gone to the house of the parents of Kusumben at village Arethan and had informed her mother, P.W.4, Ambaben Balwantbhai, that Kusumben was critically ill. P.W.4, Ambaben Balwantbhai, had informed the appellant No.2 that the father of Kusumben had gone to Bombay and she was alone in the house. The appellant No.2 had left the house of P.W.4, Ambaben, and gone to village Rander. On the next day, the mother of Kusumben, accompanied by Ambhabhai, Nanubhai Vakil and Sukhabhai Kothari, had gone to the matrimonial home of Kusumben at village Rander. They found that Kusumben was not ill. The father-in-law and the mother-in-law of Kusumben and her husband and appellant No.2, Nareshkumar, were present in the house.

The appellant No.1, Deviben, who is the mother-in-law of Kusumben, had handed over a letter to Nanubhai Vakil. The said letter was read over by Nanubhai Vakil, wherein, it was stated that Kusumben should take a divorce from her second husband and, if she fails to give divorce or obtain divorce from her second husband, Kantibhai, he would be done to death. The letter indicated that, prior to second marriage, Kusumben had an illicit relation with a person, who had written the said letter. Nanubhai Vakil, after reading out the said letter, had expressed an opinion that some one appears to have written the letter to ruin the matrimonial life of Kusumben. Ambaben, the mother of Kusumben, had expressed her desire to take Kusumben to village Arethan, but the parents of husband of Kusumben had informed the mother of Kusumben that Kusumben should first give a definite reply about the contents of the letter and thereafter only they would permit her mother to take Kusumben to her parents' house. On hearing this reply from the parents of the husband of Kusumben, her mother had got enraged and had given two slaps to Kusumben by uttering words by scolding her that why she was keeping affairs with other person. Saying so, the mother of Kusumben along with other persons had left the house of the appellants and had gone to their village Arethan.

3. On July 11, 1994, around 5 p.m. Kantibhai, husband of Kusumben, had brought Kusumben with severe burn injuries to Maskati Charitable Hospital, Surat. The Medical Officer of the Emergency Ward, P.W.1, Dr. Sachdev, had examined Kusumben and got her admitted in the Emergency Ward as she was in critical condition. At the time of admission, PW.1, Dr. Sachdev, had enquired from Kusumben and Kusumben herself had stated before the Doctor that she was set on fire prior to 1.1/2 hours by her mother-in-law and brother-in-law. The said history was noted down by P.W.1, Dr. Sachdev, in the medical case papers Exh.13 of Maskati Hospital. As per the said case papers, Kusumben had sustained burn injuries of first and second degree and the extent of burn injuries was 90% to 95%. As it was a medico-legal case, P.W.1, Dr. Sachdev, had directed the operator of the hospital, one Mahendrabhai Lallubhai of the hospital, to inform the police about Kusumben having sustained injuries and admitted in the hospital. Accordingly, the said Operator, Mahendrabhai Lallubhai, around 17.25 hrs, had sent vardhi i.e. Janvajog Entry Exh.47 to Rander Police Station informing that one lady by name Kusumben Kantilal Raghabhai Thakore of about 25 years residing at Rander, Hanuman Tekri, Surat, had sustained burn injuries around 3 p.m. in her house due to some reasons and was brought

by her husband Kantilal around 5 p.m. and was admitted in Ward No.2 of the said hospital. It was also mentioned in the entry that the condition of the patient was critical. The said entry was entered in the register kept at Rander Police Station. The Police Station Officer, who had received the information, had, in turn, informed P.W.9, PSI, J.N. Chavda. On receipt of the information, P.W.9, PSI, Shri J.N. Chavda had gone to the Burns Ward, Muskati Hospital. PW 9, PSI, J.N. Chavda, found that the treatment of Kusumben was in progress. On enquiry from the Doctor who was treating Kusumben, P.W.9, P.S.I. Chavda had learnt that the patient was conscious and was in a position to make statement. Therefore, P.W.9, PSI, Chavda, had sent yadi to the Executive Magistrate, Surat, requesting him to come immediately to record dying declaration of the patient, Kusumben. Below the said yadi, a written endorsement of the Doctor, who was treating Kusumben, was obtained to the effect that the patient was conscious. The said yadi was received by the Executive Magistrate, Jayantilal Babarbhai Patel (PW 6), around 7 p.m. P.W.6, Mr. Patel, immediately had gone to Maskati Hospital and visited the Burns Ward where Kusumben was under treatment. P.W.6, Mr. Patel, had first contacted the Doctor who had made endorsement below yadi Exh.26, and had verified whether the patient was conscious and in a fit state of mind to give her statement. Having satisfied that the patient was conscious and in a fit state of mind to give statement, P.W.6, Mr. Patel, had started recording statement in the Burns Ward at 7.25 p.m. and had completed it at 7.40 p.m. In the said statement, Kusumben had categorically stated that kerosene was poured on her and she was set ablaze by her mother-in-law and brother-in-law. After recording of dying declaration was completed, PSI,Chavda, had also enquired from Kusumben how she had sustained burn injuries. Kusumben had narrated the incident in detail which was recorded by PSI, Chavda, in the form of a complaint. The complaint lodged by Kusumben was recorded around 7.30 p.m. Below the complaint, an endorsement of the Doctor on duty was obtained that the patient was conscious. PSI, Chavda, had sent the said complaint to Rander Police Station for registering the offence against the appellants under Sections 307 and 114 IPC. The offence was registered at Rander Police Station, being CR No.I-217/94, against the appellants for the offences under Sections 307 and 114 IPC. P.W.11, P.I. V.N. Brahmbhatt of Rander Police Station, was entrusted with the investigation of the above crime. P.I. Brahmbhatt, had immediately gone to Maskati Hospital and had recorded statement of the husband of Kusumben. P.I. Brahmbhatt,

had, thereafter, gone to the place of incident where Kusumben had sustained burn injuries. As it was not possible to draw a panchanama of place of incident because of late night hours, P.I. Brahmbhatt had drawn the panchanama of the place of incident on the next day, i.e. July 12, 1994. Kusumben, who had sustained serious burn injuries, was treated in the Burns Ward of Maskati Hospital upto July 17, 1994 but, ultimately, she succumbed to the burn injuries around 9.30 p.m. on July 17, 1994. P.I. Brahmbhatt, had held inquest of the dead body of Kusumben and had sent it for post-mortem. P.W.5, Dr. Shaikh of Civil Hospital, Surat, had performed autopsy of the dead body of Kusumben. On the death of Kusumben, offence under Section 302 IPC was added in Crime Register, bearing C.R.No.I-217/94. P.I. Brahmbhatt had recorded statements of various witnesses and, on completion of the investigation, and on receipt of the post-morten notes and other case papers relating to treatment received by Kusumben, had filed chargesheet against the appellants in the Court of the Chief Judicial Magistrate, Surat,on August 6, 1994, for the offences under Sections 302 and 114 of the IPC, which came to be registered as Criminal Case No.2613 of 1994. As the offence under Section 302 of the IPC is exclusively triable by the Court of Sessions Judge, the learned Chief Judicial Magistrate, Surat, had committed the case to the Court of Sessions, at Surat, where it came to be numbered as Sessions Case No.155 of 1994.

4. Charge Exh.3 was framed against the appellants for the offences punishable under Sections 302 read with Section 34, in the alternative, under Section 302 read with Section 114 of the IPC. The charge was read over and explained to the appellants wherein they pleaded not guilty and claimed to be tried. The prosecution, in order to prove the charges framed against the appellants, examined: (1) P.W.1,.Dr. Divya Ravindrasinh Sachdev, Medical Officer, Maskati Hospital, Exh.11; (2) P.W.2, Natwarlal Ramjibhai Kosambia, panch of scene of offence panchanama, Exh.19; (3) P.W.3, Balwantbhai Becharbhai Surti, father of deceased Kusumben, Exh.20; (4) P.W.4, Ambaben Balwantbhai, mother of deceased Kusumben, Exh.21; (5) P.W.5, Dr.Iliyas I.Shaikh, Medical Officer, Municipal Civil Hospital, Surat, who performed autopsy,Exh.22; (6) P.W.6, Executive Magistrate, Jayantilal Babarbhai Patel, Exh.25; (7) P.W.7, Dr. Rajesh Maheshbhai Umarigar, Medical Officer of Maskati Hospital, Ex.31; (8) P.W.8, Kesrising Hirabhai Parmar, photographer who took photographs of scene of offence, Exh.32; (9) P.W.9, PSI, Jethabhai Naranbhai Chavda, Rander Police Station, Exh.42; (10) P.W.10, Police Head Constable, Dulabhai

Raisingbhai Chaudhari, Exh.49; and (11) P.W.11, IO, PI, Vasant Nanalal Brahmbhatt, of Rander Police Station. The prosecution also produced documentary evidence such as inquest panchanama Exh.9, map of scene of offence Exh.10, medical case papers and treatment chart of Emergency Ward and Burns Ward of Maskati General Hospital Exh.13, 14 and 15; endorsement of Medical Officer below FIR Exh.16, endorsement below yadi sent to the Executive Magistrate, Exh.17, post-mortem notes Exh.28, certificate with regard to cause of death Exh.24, yadi received by the Executive Magistrate to record dying declaration Exh.26, dying declaration recorded by the Executive Magistrate, Exh.27; negatives of photographs of scene of offence Exh.34, Exh.35, photographs Exh.38 to 41; first information report recorded by PSI, Chavda, Exh.44; yadi for registration of offence Exh.45, report under Section 157 of the Code sent to the Magistrate, Exh.46; Janvajog Entry dated 11.7.1994 sent by the Operator of Maskati Hospital to Rander Police Station, Exh.47, report to add offence under Section 302 in the station diary entry, Exh.50; scene of offence panchanama Exh.52, to prove the case against the appellants.

5. After the evidence of the prosecution was over, the appellants were questioned generally and their statements came to be recorded under Section 313 of the Code. The defence of the appellants was of general denial. The appellants also filed their written statements pleading that they were falsely involved by the husband of Kusumben, namely, Kantilal, with connivance of the prosecution witnesses and the Investigating Agency. No witness in defence was examined by the appellants.

6. The learned Additional Sessions Judge, on appreciation of oral as well as documentary evidence and the arguments advanced by the learned Additional Public Prosecutor and the learned advocate for the defence, held that deceased Kusumben had died homicidal death. It was held that the deceased had not died due to accidental or suicidal death. The first dying declaration recorded by Dr.Sachdev on the basis of the history narrated by the deceased; the second dying declaration recorded by the Executive Magistrate and, thirdly, the First Information Report, which had become a dying declaration on the death of Kusumben, recorded by PW 9, PSI, Chavda, do not suffer from infirmity and, therefore, do not require any corroboration. It was, further, held that the deceased was in a fit state of mind and was fully conscious at the time of making the above dying declarations and the Doctors who had made endorsements were satisfied about

her fit state of mind and consciousness and, therefore, had made endorsements on all the documents and dying declarations. The oral evidence of Dr. Sachdev had established beyond doubt that the deceased was in fit state of mind and well oriented at the time of making the above dying declarations which had established that the appellants had poured kerosene on the deceased and set her ablaze. The learned Additional Sessions Judge was of the view that the letter, which was received prior to few days of the incident, was the root cause, which led the appellants to commit the murder of the deceased, Kusumben, as they suspected that she was having illicit relation with some other person and had brought disrepute to the prestige of their family. On the basis of the abovereferred to conclusions, the learned Additional Sessions Judge has convicted the appellants for the offences punishable under Section 302 read with Section 114 of the IPC and sentenced them to undergo R.I. for life and imposed fine of Rs.500/- on each of them in default S.I. for one month, which has given rise to filing of the present appeal.

7. Learned counsel, Mr. K.B. Anandjiwala, for the appellants and learned APP, Ms. Hansa Punani, have taken us through the entire record and proceedings of Sessions Case No.155 of 1993. We have also minutely scrutinized and reappreciated the entire evidence led by the prosecution at the trial.

8. Learned counsel, Mr. K.B. Anandjiwala, for the appellants, has submitted that the dying declaration recorded by the Executive Magistrate and the other dying declaration in the form of First Information Report, were recorded when the deceased was administered heavy drugs of 'Fortwin and Compose by intravenus injections'. It is submitted that, after administration of the above drugs, the patient, who was not in a fit state of mind, could not have given statements. It is submitted that the endorsements of Dr. Sachdev that the patient was in fit state of mind was made without examining the patient and without verifying whether she was in a fit state of mind. It is submitted that the case papers and the chart showing the treatment given to the deceased did not show at what time the above drugs were administered on the deceased. That, admittedly, the patient was admitted in the Burns Ward at 5.45 p.m. and the statement came to be recorded around 7.30 p.m. and, as the patient was screaming in pain due to severe burn injuries, pain killing injections must have been administered since the patient was admitted in the Burns Ward. It is submitted that Dr.Sachdev was Medical Officer attached to the

Emergency Ward and she could not have made endorsement when the statements in the nature of dying declaration and First Information Report were recorded in the Burns Ward. It is further submitted that, as per the evidence of Dr. Sachdev, the Doctor, who was treating the patient in the Burns Ward, had refused to sign the endorsement with regard to conscious state of mind of the patient, which indicated that the patient was not in fit state of mind or well oriented to give statement. In light of the above facts, it is submitted by the learned counsel for the appellant that the dying declaration recorded by P.W.6, J.B. Patel, Executive Magistrate, Exh.27, and the First Information Report Exh.44 recorded by P.W.9, PSI, Chavda, ought not to have been relied upon for holding the appellants guilty of the murder of deceased Kusumben. With regard to the history narrated by the deceased Kusumben, at the time of her admission in the hospital, before Dr. Sachdev, it is submitted that the patient was accompanied by her husband, Kantilal, who had tutored the patient-deceased to make statement against his brother and mother. It is submitted that, as per the evidence of P.W.1, Dr. Sachdev, the patient was admitted in the hospital at 5 p.m. and the patient had narrated the history of sustaining burn injuries as a result of pouring kerosene by her mother-in-law and brother-in-law. It is submitted that the said information was conveyed to Rander Police Station by telephone operator, Mahendrabhai, at 17.25 hrs and the said Janvajog Entry was produced at Exh.47. It is submitted that as per the Janvajog Entry Exh.47 recorded at the police station, the cause of sustaining burn injuries was said to have been "due to some reason" and not due to pouring of kerosene by the appellants and setting the deceased ablaze. The learned counsel for the appellants, in view of the above inconsistency between the history narrated by the deceased and the contents of the Janvajog Entry Exh.47, has contended that there was inconsistency between the history narrated by the deceased and the said Janvajog Entry Exh.47 and, therefore, the said history narrated by the deceased, which was treated as dying declaration after her death, suffers from infirmity and it cannot be acted upon without corroborative evidence or some other surrounding circumstances. It is submitted that there was no motive on the part of the appellants to commit the murder of the deceased Kusumben and, as per the evidence of the prosecution, the deceased was treated well at the matrimonial home and there were no ill-feelings between the deceased and her in-laws or her husband after the second marriage. The learned counsel for the appellants submitted that there was inconsistency between the three dying declarations and, unless those dying declarations

were supported by corroborative evidence of surrounding circumstances, it would be unsafe and hazardous to sustain the conviction of the appellants on those dying declarations and, therefore, the conviction recorded and the sentence imposed on the appellants by the learned Additional Sessions Judge be quashed and set aside and the appeal be allowed.

9. The learned Additional Public Prosecutor, on the other hand, has submitted that there was no inconsistency between three dying declarations and, therefore, the conviction and sentence be confirmed. It is submitted that there was motive on the part of the appellants to do away with the life of the deceased as she had brought disrepute to the family when the letter was received indicating her illicit relationship with some other person. It is submitted that, when the incident had taken place, the appellants were the only persons present in the house where the deceased was set on fire. The learned Additional Public Prosecutor has submitted that there were no infirmities in the dying declarations of the deceased and, therefore, the conviction recorded and the sentence imposed on the appellants by the learned Additional Sessions Judge be confirmed and the appeal be dismissed.

10. Law on the question of dying declaration is well settled that a dying declaration can form the sole basis for conviction without any corroboration if the same is true and correct version of a dying man and is not stated to have been made under any doubtful circumstances. It was like any other prosecution evidence and subject to scrutiny. Corroboration was not sought for because it was a weak piece of evidence, but corroboration was sought for because it suffers from certain infirmity. It is, therefore, necessary to find out whether there are any infirmities in the dying declaration of the deceased recorded in the nature of history narrated by her to P.W.1 Dr. Sachdev, the dying declaration recorded by P.W.6, J.B. Patel, Executive Magistrate, and the First Information Report recorded by P.W.9, PSI, Chavda.

11. With regard to the dying declaration recorded by the Executive Magistrate and the First Information Report recorded by PSI, Chavda, it must be stated that the medical case papers showing the treatment given to the deceased in the Burns Ward did not indicate at what time the pain-killing injections were administered on the deceased. Even according to P.W.1 Dr. Sachdev and P.W.7 Dr. Umarigar who had treated the deceased at the hospital, if the injections of fortwin and calmpose were

administered to the deceased, who was having severe burns, then she would go in tranquillity, and she cannot remain in well-oriented state of mind to make the statement. In the yadi, which was sent to the Executive Magistrate to record statement of the deceased, there was an endorsement made by Dr. Sachdev that the patient was conscious, but, Dr. Sachdev had not stated that the patient was well-oriented so as to make her statement. It must be stated that the said endorsement was dated 21.7.1994 but was subsequently corrected as 11.7.1994 in the original copy, which was received by the Executive Magistrate. PI, Brahmbhatt, during his deposition, had produced carbon copy of the yadi sent to the Executive Magistrate requesting him to record dying declaration of the deceased, wherein, the endorsement that the patient was conscious bears the date of 21.1.1994 and that was also in fresh ink and not of carbon copy. This indicates that the yadi, which was sent to the Executive Magistrate,was a concocted piece of evidence and did not show the conscious state of mind of the deceased. On receipt of the said yadi, PW 6, Executive Magistrate, Mr. Patel, had arrived at Maskati Hospital to record dying declaration of the deceased. In the said dying declaration, the deceased could not state her age and could not reply as to where she was. whether in the hospital or in her house. In the oral evidence, PW 6, Executive Magistrate, Mr. Patel, had to admit that he had shouted at the patient before bringing her to sense and before recording of the statement. This also shows that the patient was in deep sleep due to administration of drugs and was not in a fit state of mind. Though it is not incumbent upon the Executive Magistrate to take endorsement of the Doctor after completing the dying declaration, but, when such was the condition of the deceased at the time of recording of the dying declaration, it would have been proper for the Executive Magistrate to obtain an endorsement of the Doctor after completing the dying declaration. In view of the above facts, we are of the view that the dying declaration recorded by PW 6, Executive Magistrate, Mr. Patel, suffers from serious infirmities.

12. P.W.9, PSI, Chavda, on arrival at the hospital, had also enquired and interrogated the deceased in the Burns Ward about the factum as to how she sustained burn injuries and had recorded her statement in the form of First Information Report, which had also become dying declaration after death of the deceased. The said First Information Report was said to have been recorded at 7.30 p.m. simultaneously when the Executive Magistrate had recorded the dying declaration between 7.25 p.m. and

7.40 p.m. PW 9, PSI, Chavda, and PW 6, Executive Magistrate, Mr. Patel, in their oral deposition, had categorically admitted that nobody was present and no police officer was present when the dying declaration of the deceased was recorded. The First Information Report was recorded by PSI, Chavda, in the Burns Ward, but no endorsement of the Doctor who attended the patient in the Burns Ward, was obtained and, instead, the endorsement of Dr. Sachdev, who had treated the patient in the Emergency Ward in the evening, was obtained with regard to consciousness of the patient. This circumstance also shows that the First Information Report recorded by PSI, Chavda, which had become dying declaration after death of the deceased, also suffers from serious infirmities for which corroboration is required from surrounding circumstances.

13. We are now left with the dying declaration which was first in point of time recorded in the nature of history narrated by the deceased before P.W.1, Dr.Sachdev. The history, as narrated by the deceased, was entered in the case papers of Maskati Hospital produced at Exh.13. As per the endorsement made in the margin of Exh.13, below date 11/7, the time was shown as 5 pm and signature of Dr.(Mrs) Sachdev is mentioned and below that an endorsement is made to inform police. The above information was conveyed by the telephone operator of the hospital, Mahendra Lallubhai, around 17.25 hrs. The said telephone operator was not examined before the Sessions Court. It is pertinent to note that, in the said information, in the nature of Janvajog Entry sent to Rander Police Station, it was conveyed that the deceased had sustained burn injuries due to some reasons. If the history was narrated by the deceased before Dr. Sachdev that she had sustained burn injuries as her mother-in-law and brother-in-law had poured kerosene and set her ablaze around 3 p.m. then, the information would have contained such words and not that 'the deceased had sustained burn injuries due to some reasons'. This also raises serious doubt about genuineness of the history and recording thereof in the case papers Exh.13. PW 11, PI, Brahmbhatt, in his oral deposition, had admitted that, in Maskati Hospital, in casualty ward, a police constable was kept along with a register to inform the concerned police station about the medico-legal cases and to make an entry in the said register. Why the police constable who was posted at Maskati Hospital, was not asked to enter the history as narrated by the deceased in the hospital and why the said police constable on duty at casualty ward was not directed to convey information to the concerned police station, raise serious doubt in our

mind. It is also pertinent to note that, in the medico-legal case certificate of Maskati Charitable Hospital issued on July 17, 1994, the time of admission of the deceased was stated to be 5.45 a.m. It may be due to mistake instead of "pm" it was mentioned as 5.45 a.m. But, the fact remains that, as per the certificate Exh.15, the patient was admitted at 5.45 p.m. in the evening. According to the evidence of Dr.Sachdev, the patient was examined by her in the hospital in the Emergency Ward at 5 pm. The said variance in the dying declaration with regard to admission of the patient in the hospital also raises doubt about the veracity of the history narrated by the patient before Dr.Sachdev and, therefore, we are of the opinion that the said history, which had become dying declaration, also suffers from the aforestated infirmity. A dying declaration, before it could be relied upon, must pass a test of reliability. Hence, to remove the doubts created in our mind, the prosecution ought to have examined the husband of the deceased who had brought the deceased to the hospital in a serious condition. The operator who conveyed information in the nature of Janvajog Entry to Rander Police Station from the hospital is also not examined to clarify the inconsistency with regard to the message conveyed to Rander Police Station which was produced at Exh.47 contrary to the history stated by the deceased in case papers Exh.13.

14. PW 11, PI, Brahmbhatt, who was in-charge of the investigation, had come to the hospital immediately after the offence was registered against the appellants and had gone to the bed where the deceased was kept in the Burns Ward. He categorically deposed that, at that point of time, the deceased was not in a fit state of mind or was not conscious to give any statement. This also raises serious doubt in our mind as to whether the deceased was in a fit state of mind to give her statement in the nature of First Information Report when it was recorded. The panchanama of the scene of offence Exh.52 was drawn by the Investigating Officer on the next day, i.e. July 12, 1994. In the said panchanama, no incriminating articles were found, which could have been used by the appellants to commit murder of the deceased by pouring kerosene and setting her ablaze. The articles lying in the living room were not disturbed and were in proper order. Only the roof and ceiling fan had become black by flames of fire and smoke If the appellants had poured kerosene on the deceased and she was set on fire, she would have tried to run helter-skelter to save herself and the articles lying in the room would have been scattered and might not have remained in the same

position. The deceased when she was set on fire would have raised shouts and would have tried to run out of the house and her shouts must have been heard by the neighbours. Even though, as per the evidence of PI, Brahmbhatt, statements of the neighbours were recorded, no witness was examined to throw some light as to how the incident had taken place. Withholding evidence of the witnesses of the neighbourhood also raises serious doubt in our mind about the manner in which the incident had taken place, as alleged by the prosecution. If the deceased was set on fire, some person must have tried to save her and water must have been sprinkled on her body, but no such evidence was found from the place of incident. The person, who had gone to call the husband of the deceased, was also not examined. The person, who had first taken her to the hospital and before whom the history was narrated by the deceased before P.W.1, Dr. Sachdev, was also not examined by the prosecution. The husband of the deceased could have been the best person to depose about the mental state of the deceased after she had sustained the burn injuries. The prosecution has suppressed the evidence by withholding the witnesses from telling the truth as to how the incident had taken place.

15. When the three dying declarations referred to hereinabove suffer from certain infirmities, they should be supported by some independent corroborative evidence, but, we do not find any such evidence - supportive or corroborative - to rely on the said three dying declarations. The evidence led by the prosecution shows that after the second marriage, the deceased was living happily in the joint family and she was not having any ill-feelings or complaints against her in-laws. The trouble started only when the letter was received indicating an illicit relation of the deceased with some other person prior to the second marriage. When the letter was received, the parents of the deceased were called and the parents had got annoyed and the mother who had come to the house of the deceased had given her 2-3 slaps and scolded her. If any person could have any grudge against the deceased, it should be the husband and not the appellants.

16. As observed earlier, when the said dying declaration, on which reliance is placed by the prosecution, suffers from infirmity, the Court would surely be in search of corroborative piece of evidence indicating that the appellants were guilty of committing murder of the deceased. No corroborative piece of evidence, as discussed above, is found on the record of

this case. It must be stated that the Investigating Agency had carried out the investigation in a most perfunctory and casual manner. The statements of the independent witnesses staying in the surrounding locality where the deceased was staying were recorded, but, they were not examined at the trial. The most important witness, whose evidence could have thrown light about the condition of the deceased when she was brought to the hospital, was the husband, Kantilal, but, unfortunately, even though his statement was recorded, he was not examined at the trial. In a case of this type, therefore, it cannot be said that the prosecution has proved beyond reasonable doubt that this was a case of homicide and not of suicide. In our opinion, having regard to all the circumstances of the case, it is not possible to arrive at the conclusion that the guilt of the appellants has been proved beyond reasonable doubt by the statement contained in the oral and recorded dying declarations. The appellants are, therefore, entitled to this benefit.

17. As a result of foregoing reasons, the appeal is allowed. The conviction of the appellants, Deviben and Nareshkumar Raghabhai @ Keshavbhai, under Section 302 read with Section 114 of the Indian Penal Code and the sentence imposed on each of them to undergo R.I. for life and fine of Rs.500 on each of them in default S.I. for one month, recorded by the learned Additional Sessions Judge, Surat, in Sessions Case No. 155 of 1993, vide judgment and order dated March 12, 1996, are quashed and set aside. The appellant No.1, Deviben, is on bail and her bail bonds shall stand cancelled. Appellant No.2, Nareshkumar Raghabhai @ Keshavbhai, who is in custody, shall be set at liberty forthwith, if his presence is not required in connection with any other case. The muddamal be destroyed as per the directions contained in the impugned judgment and order of the learned Additional Sessions Judge, Surat.

(A.R. Dave, J.)

(M.H.Kadri,J.)

(swamy)